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# In the Supreme Court of the United States

OCTOBER TERM, 1973

~~73-66~~

**SCHOLLE CHEMICAL CORPORATION, SCHOLLE CONTAINER CORPORATION and SCHOLLE NORTHLAKE CORPORATION,**

*Petitioners,*

vs.

**NATIONAL LABOR RELATIONS BOARD,**

*Respondent.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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# In the Supreme Court of the United States

OCTOBER TERM, 1973

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## NO.

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**SCHOLLE CHEMICAL CORPORATION,
SCHOLLE CONTAINER CORPORATION and
SCHOLLE NORTHLAKE CORPORATION,**

*Petitioners,*

VS.

**NATIONAL LABOR RELATIONS BOARD,**

*Respondent.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioners Scholle Chemical Corporation, Scholle Container Corporation, and Scholle Northlake Corporation ("Scholle") pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit. That court enforced an order of the National Labor Relations Board ("Board") that Scholle must allow nonemployee union organizers onto its private property to solicit its employees and distribute union literature.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is not yet reported in the Federal Reporter; it appears at 82 LRRM 2410 and at 70 CCH LC ¶13,341, and is printed as Appendix A to this petition. The decision and order of the National Labor Relations Board (App. D) are reported at 192 NLRB No. 101 (1971). The underlying decision of the Board Trial Examiner is printed as Appendix E.

## JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on February 9, 1973 (App. B). Scholle's petition for rehearing was denied on April 12, 1973 (App. C). This petition was filed within 90 days of that date. This Court has jurisdiction under 62 Stat. 928, 28 U.S.C. §1254(1).

## QUESTIONS PRESENTED

This case arises out of an attempt by full-time union representatives to organize petitioners' employees. None of the employees were union members and none resided on petitioners' private property. They worked regular shifts in a typical industrial setting and lived in surrounding suburbs and towns.

This case presents the following questions for review:

1. Whether the Seventh Circuit's decision that an employer in an ordinary industrial setting must open its private property to nonemployee union organizers is contrary to this Court's opinion in *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956) and improperly infringes petitioners' constitutionally-protected property rights.

2. Whether the Seventh Circuit's decision that the employer has the burden of showing that the union has access to its employees without use of its private property conflicts with the decision of the Eighth Circuit in *Central Hardware Co.* v. *NLRB*, 468 F.2d 252 (8th Cir. 1972).

3. Whether the Seventh Circuit's requirement that union communication be "productive" is contrary to *Babcock* and converts the National Labor Relations Act's neutrality in organization matters into a partisan guarantee that the union's efforts to organize will succeed.

## STATUTORY PROVISIONS INVOLVED

Section 8(a)(1) of the National Labor Relations Act, as amended [29 U.S.C. 158(a)(1)], provides:

> "Section 8(a). It shall be an unfair labor practice for an employer—
>
> "(1) to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7".

Section 7 of the National Labor Relations Act, as amended [29 U.S.C. 157], provides in pertinent part:

> "Section 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . ."

## STATEMENT OF THE CASE

This petition seeks review of a decision of the Seventh Circuit enforcing an order of the National Labor Relations Board. The Board, in a 3-2 decision, held that Scholle was guilty of an unfair labor practice under the National Labor Relations Act ("Act") because it refused to open its private property to nonemployee union organizers.

### The Babcock Decision

In *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956), this Court upheld the right of the employer to refuse to permit distribution of union literature by nonemployee union organizers on company private property because the employees were within the reach of the union outside company property. This Court said:

> "It is our judgment . . . that an employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution." 351 U.S. at 112.

### The Scholle Plant

The Scholle plant is located in a privately-owned industrial area in Northlake, Illinois, and connects by a short private road (owned by an unrelated corporation) to a public thoroughfare at the edge of Scholle's property. Scholle prohibits, without discrimination, all solicitations on its property. All of Scholle's 355 hourly employees live off the premises: 27% in Northlake itself, 58% in surrounding suburbs, and 15% in Chicago (immediately adjacent to Northlake).

**Union Attempts at Distributing Literature**

An organizer of Oil, Chemical & Atomic Workers International Union ("Union") began an attempt to organize Scholle employees when he and an associate arrived at the Scholle plant to pass out union literature. The organizers were told that they were on private property and were asked to use contiguous public property. They stood on that public property for approximately 10 minutes, distributed union literature, and left.

Ten days later, when Scholle management was known to be absent, two organizers spent nearly one hour on Scholle property distributing literature. The only further attempt at handbilling occurred more than four months later—the week before the hearing on this complaint—when one of the organizers stood for approximately 3½ hours at the entrance to the private road distributing union literature.

**The Union's List of Employees**

The Union obtained a list of the names and home addresses of approximately 60% of the Scholle work force. This list was used by the Union to mail union literature and authorization cards to Scholle employees. The Union did not attempt to complete the address list from license plate information, although it had previously used this technique.

The Union used no posters, banners, signs, armbands, bumper stickers, aprons, other visual messages, or loudspeakers to further its organizational effort. It did not attempt to contact employees through company sport teams, nor by advertising in local, neighborhood or metropolitan newspapers, on radio or television. The Union

held no meetings in motel rooms, public meeting places or employee homes. The Union used these techniques in past campaigns directed against other companies. Its failure to do so in this case was not explained.

**Decision of the Labor Board**

The Board Trial Examiner found that Scholle's employees were inaccessible, and recommended an order finding Scholle guilty of an unfair labor practice for violating its employees' self-organization rights under Section 7 of the National Labor Relations Act. (App. 18-41.) By a 3-2 decision (Chairman Miller and Member Kennedy dissenting), the Board adopted the Trial Examiner's findings and conclusions. (App. 11-17.)

**Decision of the Seventh Circuit**

Although all decisions applying *Babcock* have permitted union intrusion on private property only where employees permanently reside on the property, the Seventh Circuit held that the Scholle employees were "inaccessible." It held that ". . . the teachings of *Babcock* require that Scholle's property rights yield . . .". (App. 6.)

## REASONS FOR GRANTING THE WRIT

The rule announced by this Court in *Babcock* preserves neutrality in organizational matters. Under *Babcock*, an employer is not required to open its private property to a union unless employees can learn by no other means that the union is interested in organizing them.

While the opinion of the Seventh Circuit purports merely to be a decision finding substantial evidence to support the Board's conclusion that the Scholle employees were "inaccessible," it is based upon unprecedented legal determinations which upset the neutral balance created by the Act and mandated by *Babcock*. This is the first enforced Board order requiring an employer to allow a union onto company private property in a typical industrial situation.

The decision of the Seventh Circuit infringes constitutionally-protected rights of private property; it also constitutes a radical departure from established principles of federal labor policy. The decision is contrary to this Court's opinion in *Babcock* and is in conflict with the Eighth Circuit's decision in *Central Hardware Co.* v. *NLRB*, 468 F.2d 252 (8th Cir. 1972) (*on remand from* 407 U.S. 539 (1972)).

## I.

## THE SEVENTH CIRCUIT'S OPINION ENUNCIATES STANDARDS CONTRARY TO BABCOCK FOR OPENING AN EMPLOYER'S PRIVATE PROPERTY TO UNION ORGANIZERS.

The *Babcock* rule protects an employer's private property rights. It safeguards the employer's interest in excluding from its property those whose activities are unconnected with the operations of the business, whose presence it does not want to supervise, for whose conduct and safety it does not wish to be responsible, and who, in general, distract management, employees and others from business functions. These are legitimate concerns and, absent some compelling countervailing interest, are constitutional prerogatives inherent in the concept of private property.

The *Babcock* decision contains only a limited exception to its protection of private property rights. As recently as last year, this Court in *Central Hardware Co.* v. *NLRB*, 407 U.S. 539 (1972) held that union solicitation and distribution of literature in retail store parking lots was governed by *Babcock*. This Court said that any other result would "constitute an unwarranted infringement of long-settled rights of private property protected by the Fifth and Fourteenth Amendments." 407 U.S. at 547. The Eighth Circuit, on remand, held that the union had not established the extraordinary circumstances required by *Babcock* to warrant intrusion on private property. 468 F.2d 252, 256 (1972).

Until the decision of the Seventh Circuit in this case, the Board and courts followed the guidelines set forth in *Babcock*, ordering union access to private property only in unique circumstances where workers were resident-em-

ployees of a secluded resort or where the "plant" was on a remote Alaskan island. *NLRB* v. *S & H Grossinger's Inc.*, 372 F.2d 26 (2d Cir. 1967); *H & G Operating Corp.*, 191 NLRB No. 110, 77 LRRM 1758, 1971 CCH NLRB ¶23,238 (1971); *Alaska Barite Co.*, 197 NLRB No. 170, 80 LRRM 1765, 1972 CCH NLRB ¶ 24,363 (1972).* Never before, in the 17 years since *Babcock*, has an employer been required to allow a nonemployee union organizer onto its private premises to solicit unless the employees permanently resided on the property.

It is possible to hypothesize a situation where nonresident employees, for unique reasons, would be truly "inaccessible" under the *Babcock* test. But this is not such a case. If employees working shifts in a typical industrial setting, living in surrounding suburbs and towns, may be held to be "inaccessible" despite the presence of telephones, the mails, autos for home visits, and the Union's list of the names and home addresses of 60% of the employees, then union access to employer property may be ordered against virtually every industrial plant operating in the United States today. At least in the Seventh Circuit, the *Babcock* guidelines have been nullified.

*Babcock* permits only a limited exception to its general guarantee of property rights, and permits union intrusion on company property in the unique case where no other

*Even in "captive employee" situations, union access to company property has been refused where some workers could be reached outside company property. *NLRB* v. *Sioux City and New Orleans Barge Lines, Inc.*, 472 F.2d 753 (8th Cir. 1973); *NLRB* v. *New Pines, Inc.*, 468 F.2d 427 (2d Cir. 1972); *NLRB* v. *Tamiment, Inc.*, 451 F.2d 794 (3d Cir. 1971), *cert. denied*, 409 U.S. 1012 (1972); *NLRB* v. *Kutsher's Hotel & Country Club, Inc.*, 427 F.2d 200 (2d Cir. 1970).

means of communication is feasible. By stretching this exception to cover a typical industrial setting, the Seventh Circuit has established union access to employer property as a routine "right" in ordinary organization cases. The decision raises serious implications for all employers. Unless *Babcock's* "inaccessibility" requirement is to be stretched beyond recognition, and unless the concept of private property rights is to lose all vitality, the opinion of the Seventh Circuit should be reversed.

## II.

## THE SEVENTH CIRCUIT'S OPINION CONFLICTS WITH THE EIGHTH CIRCUIT'S DECISION IN CENTRAL HARDWARE BY REQUIRING AN EMPLOYER TO PROVE ITS EMPLOYEES "ACCESSIBLE".

*Babcock* creates, in effect, a rebuttable presumption that company private property is not to be used by union organizers to solicit employees. Under *Babcock,* only where the union can overcome this presumption may the employer's rights of private property be impinged upon. The Seventh Circuit upsets this presumption by requiring an employer to show that union access to its employees is available other than by actual entry upon its property.

In this case, the Union obtained a list of Scholle's employees. Using this list, the organizers reached 60% of Scholle's employees. The Seventh Circuit, based solely on the statement of one organizer that he was "never sure" of the accuracy of his list, concluded that the list "was not known to be current or accurate". The Seventh Circuit thereby dismissed as "impractical" any use of the list to communicate with employees by mail, telephone or home visits. (App. 5-6).

This constitutes an exceptional holding that, until the *employer* proves a given means of communication accurate, that means will be disregarded as an alternative to the use of company property. This is an unprecedented reallocation of the basic *Babcock* presumption; it contradicts established precedent that the burden is on the union to prove its claim in unfair labor practice cases.

In *Central Hardware Co.* v. *NLRB,* 407 U.S. 539 (1972), this Court defined the limited access right given to union organizers "[a]fter the requisite need for access to the employer's property has been shown . . ." (407 U.S. at 545). This Court thus affirmed the traditional rule that the union must show "inaccessibility," rather than the employer showing that alternatives were available to the union. This rule was also applied by the Eighth Circuit in its opinion on remand in the same case (468 F.2d at 256):

> " 'The burden was not on the Company to show that conventional means of communication and access were open, but the contrary burden rests with the General Counsel . . .' "

The Seventh Circuit's opinion is in direct conflict with the Eighth Circuit's decision in *Central Hardware.* This alone commends review by this Court.

## III.

## THE SEVENTH CIRCUIT'S OPINION CONVERTS THE ACT'S NEUTRAL STANCE, BETWEEN THE RIGHT OF EMPLOYEES TO ORGANIZE OR NOT, INTO A GUARANTEE OF UNION SUCCESS.

The Seventh Circuit did not merely hold that access to Scholle employees was unavailable to the Union; it concluded that union organizers should be permitted on company property because their efforts off the company's property were "ineffective and non-productive." (App. 6.) This is a radical departure from previous interpretations of the Act, which maintained a *neutral* balance between the right of employees to organize or not. It improperly converts the *Babcock* test of accessibility into a test of union organizational success. Under the Seventh Circuit's decision, unions are given the right to have their communications "produce." And the employer's private property is placed on the block as a "production guarantee."

The Seventh Circuit's ruling is particularly remarkable in light of the Union's laggardly organizational efforts. The Union expended minimal energy to reach Scholle employees. The organizers spent barely over one hour at the plant site and made no further efforts at organization before the Union filed the charge with the Board. They ignored usual means of communication, including those which had been successful in the past. The Union's mail solicitation campaign, which yielded a list of the names and addresses of 60% of the Scholle work force, was undertaken only after the charge was filed.

The decision of the Seventh Circuit rewards half-hearted attempts at organization at the expense of traditional concepts of private property. It effectively reverses the *Bab-*

*cock* rule without promoting any legitimate union interest. If the balanced aims of Section 7 of the Act are to retain any semblance of neutral accommodation between competing rights and interests, the Seventh Circuit's commitment to the "right" of a union to succeed must be reviewed by this Court and vacated.

## CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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Dated: July 3, 1973

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No. 73-66

JUL 5 1973

MICHAEL RODAK, JR., CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1973

~~73-66~~

**SCHOLLE CHEMICAL CORPORATION, SCHOLLE CONTAINER CORPORATION and SCHOLLE NORTHLAKE CORPORATION,**

*Petitioners,*

vs.

**NATIONAL LABOR RELATIONS BOARD,**

*Respondent.*

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## APPENDICES TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## APPENDIX A

In the

# United States Court of Appeals

## For the Seventh Circuit

SEPTEMBER TERM, 1971 — APRIL SESSION, 1972

No. 71-1824

SCHOLLE CHEMICAL CORPORATION, SCHOLLE CONTAINER CORPORATION and SCHOLLE NORTHLAKE CORPORATION,

*Petitioners-Cross-Respondents,*

*v.*

NATIONAL LABOR RELATIONS BOARD,

*Respondent-Cross-Petitioner.*

On Petition for Review and Cross Application for Enforcement of an Order of the National Labor Relations Board.

ARGUED: JUNE 13, 1972—DECIDED: DECEMBER 13, 1972

Before FAIRCHILD and SPRECHER, *Circuit Judges,* and CAMPBELL, *Senior District Judge.* *

* Senior District Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

PER CURIAM. Petitioners, the three Scholle Corporations, seek review of an order of the National Labor Relations Board finding that Scholle interfered with, restrained, and coerced its employees in the exercise of their organizational rights in violation of § 8(A)(1) of the National Labor Relations Act by refusing to permit non-employee union organizers to distribute leaflets and handbills and to solicit Scholle employees on Scholle property. The Board ordered Scholle to permit union[1] organizers to distribute union literature and to solicit union membership at points within Scholle's parking lots and to post appropriate notices. The Board has filed a cross application for enforcement of its order. Thus, the question is whether the Board's findings and order are supported by substantial evidence in the record.

The pertinent facts are not disputed by either party. The three Scholle Companies are located in a single plant building within an industrial tract in the Chicago suburb of Northlake, Illinois, near the intersection of North Avenue and Railroad Avenue. North Avenue is a four-lane thoroughfare running east and west through Chicago and certain of its western suburbs. The speed limit is posted at forty miles per hour and the average daily traffic load in both directions is about 38,000 vehicles. Railroad Avenue is a private road owned by the Automatic Electric Company, the principal occupant of the industrial tract. Scholle owns an easement over Railroad Avenue which runs north of North Avenue, perpendicular to it and dead-ends in Automatic Electric's parking lots. It is a paved, three-lane road with a posted speed limit of thirty miles per hour. Traffic control lights at the intersection of North

[1] Oil Chemical and Atomic Workers International, AFL-CIO.

and Railroad Avenues and traffic signs on Railroad Avenue itself are owned and maintained by Automatic Electric.

The Scholle plant is located on the west side of Railroad Avenue. The entrances to the plant itself, and to three adjoining company parking lots face Railroad Avenue.

Scholle employs about 350 people at its Northlake plant. None of the employees reside on the premises; approximately 27% of them reside in the town of Northlake itself, approximately 30% live in suburban DuPage County, approximately 15% live in Chicago, and the remaining 28% reside in suburbs other than Northlake or DuPage County.

Scholle's employees, as well as almost all of Automatic Electric's 11,000 employees, arrive and leave the premises by private automobile. Approximately 40% of Automatic Electric's employees use Railroad Avenue in entering or leaving the industrial tract. Shifts of the two companies overlap with the result that during the short period of time when the shifts change, it is almost impossible to distinguish Scholle employees from Automatic Electric employees.

The union's organizational campaign commenced in October of 1969. Tony Hall, an International representative of the union, met with two Scholle employees to discuss possible organization. The next day Hall and another union representative, Frank Ryan, visited Scholle's plant and while standing near the main entrance attempted to speak with the employees and distribute to them envelopes containing a handbill and authorization cards. Scholle's personnel manager informed the union representatives that Railroad Avenue was a private road and

that all non-employee solicitations and distributions on the property were prohibited.[2] Hall and Ryan then moved to the intersection at North Avenue and Railroad Avenue where they determined that because of the heavy traffic and the impossibility of ascertaining which of the passing cars contained Scholle employees, further handbilling would not be productive. Another attempt at handbilling was made, however, on November 11th but after about one hour at the entrance to the Scholle plant only 120 handbills had been distributed.

On November 8, 1969, Hall met again with the two Scholle employees who brought him an old Christmas mailing list. The list was not helpful, however, because it was out of date and contained mainly supervisors' addresses. On November 21, 1969, Hall wrote Scholle requesting access to the plant entrances for distribution of leaflets but the request was rejected on December 2, 1969. Later Hall wrote to Scholle requesting a list of names and addresses of all current hourly employees but received no response from the Company.

On April 21, 1970, Hall again attempted to handbill Scholle's employees after having been informed that Automatic Electric was on strike. After spending over two hours at the intersection during shift changing times, this effort also proved unsuccessful.

Hall also attempted several mailings to the Scholle employees. As previously stated, Hall was unable to acquire a list of current names and addresses from the Company and a Christmas list provided by Scholle employees proved to be of no use. On January 28, 1970, Hall wrote to about

[2] It is undisputed that the ban on solicitations and distributions was enforced by Scholle and Automatic Electric, the owner of the road, in a non-discriminatory fashion.

40 employees requesting assistance in compiling a current mailing list. On February 12, a mailing containing authorization cards and self-addressed envelopes was sent to 70 employees. Subsequent mailings to 150 Scholle employees and 220 Scholle employees were also attempted, again with the enclosed authorization cards and self-addressed envelopes. Hall testified that he was never sure of the accuracy either of the employees' names or addresses.

No other methods of communicating with Scholle employees, such as by newspaper advertisements or radio communications, by bumper stickers or placards, or by using loud speakers, were attempted by the union.

As both parties recognize, the principles governing non-employee solicitations on an employer's property are set forth in *NLRB* v. *Babcock and Wilcox*, 351 U.S. 105 (1956). There the Supreme Court articulated the guidelines for adjusting conflicts between the employees' organizational rights under § 7 of the Act and the employer's property rights:

> "Organization rights are guaranteed to workers by the same authority, the National Government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other. The employer may not affirmatively interfere with organization; the union may not aways insist that the employer aid organization. *But when the inaccessibility of employees makes ineffective the reasonable attempts by non-employees to communicate with them through the usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize.*" (Emphasis supplied) 351 U.S. 105, 112.

The accommodation principle enunciated in *Babcock* was recently reaffirmed by the Supreme Court in *Central Hardware Company* v. *NLRB*, 407 U.S. 539 (1972). Thus, the

question before us is whether there is substantial evidence in the record to support the Board's finding that because of the inaccessibility of the Scholle employees, reasonable attempts by non-employees to communicate with them through the usual channels were ineffective.

Since the relatively small work force of Scholle employees was diffused through the City of Chicago and the various suburbs surrounding Northlake, Illinois, it can be seen that communication with them through the customary media channels was rendered unavailable in a practical sense. Also, because attempts at acquiring a mailing list from Scholle had proved unsuccessful and because the mailing list ultimately utilized was not known to be current or accurate, communication through the mails or by way of home visits was also impractical. Handbilling at the intersection of North and Railroad Avenues was clearly ineffective because of the problems of heavy traffic and of identification of Scholle employees.

We conclude from the evidence recited above that "the reasonable attempts by non-employees to communicate with them [Scholle employees] through the usual channels" were completely ineffective and non-productive. Although reasonable efforts at communication were made by the union, the Scholle employees remained inaccessible. Under these circumstances, the teachings of *Babcock* require that Scholle's property rights yield to the extent necessary to permit communication with respect to organizational rights.

The authorities relied upon by Scholle are inapposite for in each instance feasible and effective methods of communication were available to the union organizers. In *General Dynamics*, 137 NLRB 1725 (1962), the union had access to all five of the entrances to the company plant and could reach the employees who walked to work and distri-

bute handbills to those employees who rode buses. The record in *Monogram Models, Inc.*, 192 NLRB 99 (1971), discloses that employees could be solicited while awaiting company transportation and that handbilling on the public portion of the access road leading to Monogram's parking lots reached many of the employees. Similarly in *Falk Corporation*, 192 NLRB No. 100 (1971), 25% of the employees could be reached through handbilling, a comprehensive mailing list could be compiled, and all other methods of communication listed in *Babcock* were available to the union. Nor is the recent decision of the Court of Appeals for the Eighth Circuit following remand from the Supreme Court in *Central Hardware Company* v. *NLRB*, [468] F.2d [252] (October 19, 1972), of any assistance to Scholle's position here. There the union possessed a current and accurate list of the names and addresses of approximately 80% of Central's employees, thus facilitating communication through the mails. Also, because of the proximity of the employees' residences to the company's stores, home visits were also an available method of communication. We find that each of these cases is readily distinguishable from the situation before us.

For the reasons set forth herein, the petition to set aside the order of the National Labor Relations Board is denied and the cross-application for enforcement of the order is granted.

A true Copy:
Teste:

*Kenneth J. Carrick*
*Clerk of the United States Court of Appeals for the Seventh Circuit.*
By: *Mary Ann Ciatty,*
*Deputy Clerk*

## APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SCHOLLE CHEMICAL CORPORATION, SCHOLLE CONTAINER CORPORATION, AND SCHOLLE NORTHLAKE CORPORATION,

*Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

No. 71-1824

### JUDGMENT

Before: FAIRCHILD and SPRECHER, Circuit Judges, and CAMPBELL, Senior District Judge.*

THIS CAUSE came on to be heard upon a petition for review, and on a cross-application for enforcement of, an order of the National Labor Relations Board issued on August 18, 1971, against Scholle Chemical Corporation, Scholle Container Corporation, and Scholle Northlake Corporation, their officers, agents, successors, and assigns. The Court heard argument of respective counsel on June 13, 1972, and has considered the briefs and transcript of record filed in this cause. On December 13,

* Senior District Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

1972, the Court being fully advised in the premises, handed down its decision denying the petition for review and granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, IT IS ORDERED AND ADJUDGED by the United States Court of Appeals for the Seventh Circuit that the petition for review filed by Scholle Chemical Corporation, Scholle Container Corporation, and Scholle Northlake Corporation, be and hereby is denied; and that the said order of the National Labor Relations Board in said proceeding be enforced, and that Scholle Chemical Corporation, Scholle Container Corporation, and Scholle Northlake Corporation, their officers, agents, successors, and assigns, abide by and perform the directions of the Board in said order contained.

IT IS FURTHER ORDERED AND ADJUDGED by the Court that costs shall be taxed against the Petitioners.

*Thomas E. Fairchild*
Judge, United States Court of Appeals for the Seventh Circuit
*Robert A. Sprecher*
Judge, United States Court of Appeals for the Seventh Circuit
*William J. Campbell*
Judge, United States Court of Appeals for the Seventh Circuit

A True Copy:
Teste:
*Kenneth J. Carrick*
Clerk of the United States Court of Appeals for the Seventh Circuit.
*by Mary Ann Ciatty,*
*Deputy Clerk*
[February 9, 1973]

## APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Chicago, Illinois 60604
April 12, 1973.

Before

Hon. THOMAS E. FAIRCHILD, *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*
Hon. WILLIAM J. CAMPBELL, *Circuit Judge*

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SCHOLLE CHEMICAL CORPORATION, SCHOLLE CONTAINER CORPORATION, AND SCHOLLE NORTHLAKE CORPORATION,

*Petitioners,*

No. 71-1824 vs.

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

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Petition for Review of an Order of the National Labor Relations Board.

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On consideration of the petition for rehearing and suggestion that it be heard *en banc* filed in the above-entitled cause, no judge in active service having requested a vote thereon, nor any judge voted to grant the suggestion, and the members of the panel having voted to deny a rehearing,

IT IS ORDERED that the petition for a rehearing in the above-entitled cause be and the same is hereby denied.

## APPENDIX D

## UNITED STATES OF AMERICA
## BEFORE THE
## NATIONAL LABOR RELATIONS BOARD

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SCHOLLE CHEMICAL CORPORATION, SCHOLLE CONTAINER CORPORATION, SCHOLLE NORTHLAKE CORPORATION, SCHOLLE ATLANTA CORPORATION, SCHOLLE DALLAS CORPORATION, SCHOLLE LONG BEACH CORPORATION, SCHOLLE RIDGEFIELD CORPORATION,

and

OIL, CHEMICAL & ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO

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Case No. 13-CA-9501

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### Decision and Order

On August 11, 1970, Trial Examiner Milton Janus issued his Decision in the above-entitled proceeding, finding that the Respondents, Scholle Chemical, Container, and Northlake, had engaged in and were engaging in certain unfair labor practices, and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondents filed exceptions to the Trial Examiner's Decision and a supporting brief and the General Counsel filed an answering brief.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed.[1]

[1] The Respondents' request for oral argument before the Board is hereby denied as the record and briefs adequately present the issues and positions of the parties.

The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Trial Examiner and hereby orders that the Respondents, Scholle Chemical Corporation, Scholle Container Corporation, and Scholle Northlake Corporation, Northlake, Illinois, their officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's recommended Order.[2]

IT IS FURTHER ORDERED that the complaint herein be, and it hereby is, dismissed insofar as it alleges the commission of unfair labor practices by Scholle Atlanta Corporation, Scholle Dallas Corporation, Scholle Long Beach Corporation, and Scholle Ridgefield Corporation.

Dated, Washington, D.C. August 18, 1971

*John H. Fanning*
John H. Fanning, Member

*Gerald A. Brown*
Gerald A. Brown, Member

*Howard Jenkins, Jr.*
Howard Jenkins, Jr. Member

National Labor Relations Board

(SEAL)

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[2] In footnote 8 of the Trial Examiner's Decision, substitute "20" for "10" days.

CHAIRMAN MILLER, concurring in part and dissenting in part:

Like my colleagues, I agree that the Respondents' representatives exceeded the limits of permissible conduct by escorting nonemployee union organizers across property owned by Automatic Electric Company to the public domain along North Avenue, near the Respondents' plant. However, I am not prepared to say that the Respondents violated the Act by refusing the Union access to its own property, as there has been no showing that access to the Scholle property itself is the only reasonable means of reaching Scholle employees. Nor am I constrained to decide, in the circumstances of this case, whether the Union's right of access to the employees it seeks to organize is paramount to the right of Automatic Electric to exclude such nonemployee union organizers from its property under principles established in *Babcock & Wilcox*.[3]

The facts are uncomplicated and are not in dispute. The Respondents' plant is located in a suburb of the Chicago metropolitan area. Access to this plant can be gained only by means of a three-lane road which is owned and maintained by Automatic Electric Company, another employer with a place of business on the same industrial tract.[4] The Respondents and the other employers located on this tract and their business invitees and guests use the access road, known as Railroad Avenue, pursuant to an easement granted by Automatic Electric. The latter permits no advertisement or solicitation of any kind on Railroad Avenue, which has never been dedicated to any public use. However, there is no evidence that the em-

[3] *N.L.R.B.* v. *Babcock & Wilcox Company*, 351 U.S. 105 (1956).

[4] See diagram, appended hereto.

ployers using Railroad Avenue, including Scholle, have any authority or responsibility to enforce against others these restrictions established by Automatic Electric. Vehicular traffic over the road extends only between the public throughfare, known as North Avenue, and the places of business located on the industrial tract. The intersection of Railroad and North Avenues is less than 500 feet from the Respondents' plant which is clearly visible from that point. A 50-foot strip of unpaved, state-owned land runs alongside North Avenue, between it and the Respondents' property.

On October 30, 1969, the Union decided upon a campaign to organize the Respondents' employees. On the following day, two union representatives entered the Respondents' property and began to distribute campaign materials and solicit employee support. They were interrupted by the Respondents' officials who escorted them past Railroad Avenue to the public domain along North Avenue and advised them that entry onto both their property and Railroad Avenue is forbidden to the general public. Thereupon, the Union, having come to the conclusion that it would not be "feasible" to engage in organizing activities on public property at or near the intersection of North and Railroad Avenues, requested permission from the Respondents to enter upon their property for that purpose. The Union's request was denied. The record does not indicate whether the Union made a similar request of Automatic Electric, nor was the record likely to, as Automatic Electric was not joined as a party respondent in the instant proceeding.

In my view, this failure to join Automatic Electric prevents the Board from answering a central question in this case: namely, what constitutes reasonable access to

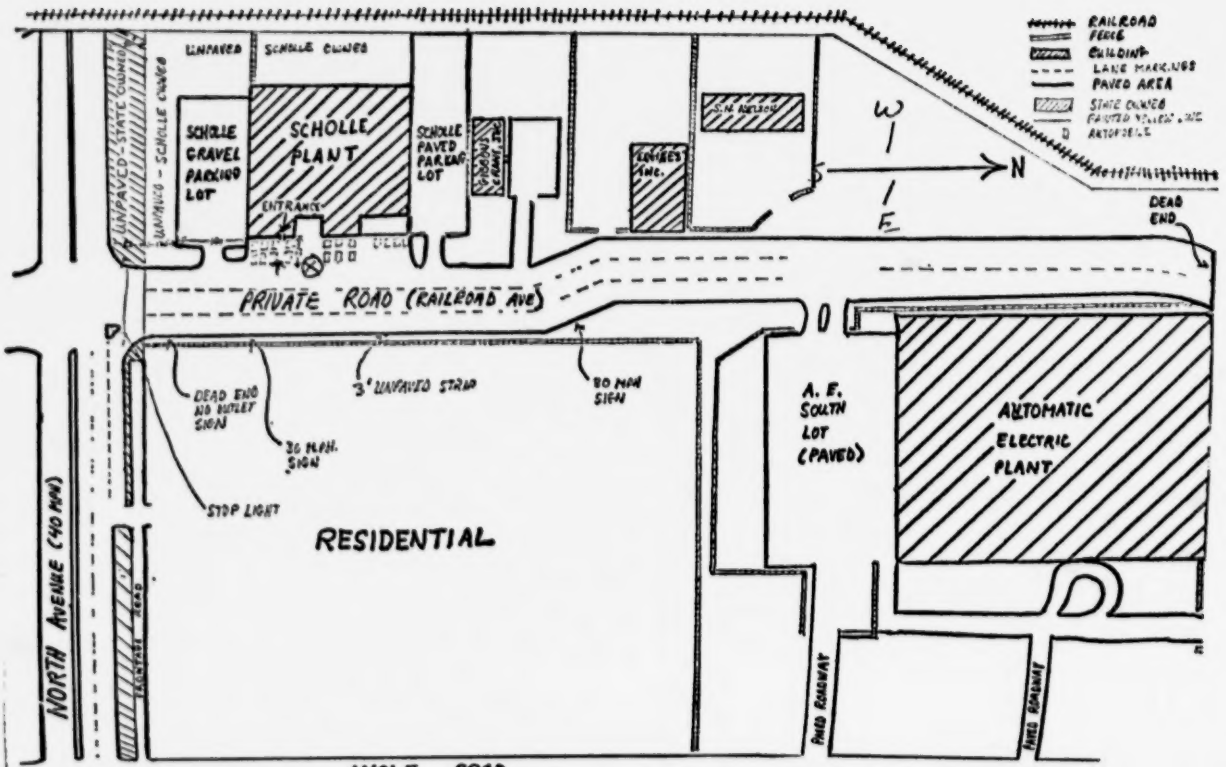
employees which a union must have in order that employees may exercise their rights under the Act and, accordingly, to what extent, if any, must property rights be circumscribed in order to obtain an accommodation between these opposing rights with as little destruction of the one as is consistent with the maintenance of the other.

This leaves for determination the question of the Respondents' conduct in asserting dominion over Railroad Avenue by excluding nonemployee organizers therefrom. No right to engage in such conduct devolves on the Respondents from any acknowledged source. I would find that, by so acting, the Respondents exceeded the limits of permissible conduct and, by thus interfering with employees' rights to self-organization, violated Section 8(a)(1) of the Act. Accordingly, I would prohibit the Respondents from themselves interfering with nonemployee union organizers who solicit or distribute compaign materials along Railroad Avenue beyond the confines of the Respondents' property.

Dated, Washington, D.C. August 18, 1971

*Edward B. Miller*
Edward B. Miller, Chairman
National Labor Relations Board

(SEAL)


RAILROAD
FENCE
BUILDING
LANE MARKINGS
PAVED AREA
UNPAVED - SCHOLLE OWNED
UNPAVED - STATE OWNED
SCHOLLE GRAVEL PARKING LOT
SCHOLLE PLANT
ENTRANCE
SCHOLLE PAVED PARKING LOT
WOODWORK & PAINT SHOP
LOWE'S INC.
W
I
F
N
DEAD END
PRIVATE ROAD (RAILROAD AVE)
DEAD END NO OUTLET SIGN
30 M.P.H. SIGN
3' UNPAVED STRIP
20 MPH SIGN
STOP LIGHT
RESIDENTIAL
NORTH AVENUE (40 MPH)
A. F. SOUTH LOT (PAVED)
AUTOMATIC ELECTRIC PLANT
PAVED ROADWAY
PAVED ROADWAY

App. 16

MEMBER KENNEDY, concurring in part and dissenting in part:

I agree with Chairman Miller's conclusion that Respondents violated Section 8(a)(1) by excluding nonemployee organizers from Railroad Avenue. I would reverse, however, the finding of the Trial Examiner that Respondents interfered with the statutory rights of employees by prohibiting distribution and solicitation by nonemployee organizers on Respondents' property. The Supreme Court held in *Babcock & Wilcox,* 351 U.S. 105, that an employer could validly post his property against nonemployee distribution of literature if reasonable efforts by a union through other available channels of communication would enable it to reach employees with its message. The record herein demonstrates that the Union in fact has reasonable access to the employees. The Trial Examiner found that during the period from January 28, 1970, through March 30, 1970, the Union had compiled a mailing list of about 220 of the approximately 350 hourly paid employees of the Respondents. The record includes a letter addressed by the Union to Respondents' employees on March 30, 1970, in which the Union stated: "A good move on our part would be to have 75 to 80% of the employees signed up and at the trial [on the complaint herein] demand recognition. The National Labor Relations Board might well order Scholle to recognize Oil, Chemical and Atomic Workers as the exclusive bargaining agent for you employees at that time." Under these circumstances, it is difficult to conclude that the Union had no effective means of reaching the employees with its message. The General Counsel, in my judgment, has not met the burden of showing that the Union was deprived of reasonable access to the employees.

Dated, Washington, D.C. August 18, 1971

*Ralph E. Kennedy*

Ralph E. Kennedy, Member

National Labor Relations Board

(SEAL)

## APPENDIX E

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD—DIVISION OF TRIAL EXAMINERS

WASHINGTON, D. C.

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SCHOLLE CHEMICAL CORPORATION, SCHOLLE CONTAINER CORPORATION, SCHOLLE NORTHLAKE CORPORATION, SCHOLLE ATLANTA CORPORATION, SCHOLLE DALLAS CORPORATION, SCHOLLE LONG BEACH CORPORATION, SCHOLLE RIDGEFIELD CORPORATION,

and

OIL, CHEMICAL & ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO

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Case No. 13-CA-9501

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TRIAL EXAMINER'S DECISION

*Statement of the Case*

MILTON JANUS, Trial Examiner: Oil, Chemical & Atomic Workers International Union, AFL-CIO (hereafter called the Union or the Oil Workers) filed its original charge on December 3, 1969, against Scholle Chemical Corporation, an amended charge on January 16, 1970, adding Scholle Container and Scholle Northlake as additional named employers, and a second amended charge on February 18, 1970, adding the other four employers listed in the caption of this case. The original complaint, based on the charge and the first amended charge, was issued on January 19, 1970. On March 3, 1970, an amended complaint was issued, based on the second amended charge. The amended complaint alleges three specific violations

of Section 8(a)(1) of the Act by the Respondents. On the last day of the hearing, the General Counsel moved to amend the complaint to add another instance of a violation of Section 8(a)(1), which I denied for reasons to be explained later.

I conducted a hearing in this matter at Chicago, Illinois, on April 28 and 29, and on May 12, 1970. After the hearing, the General Counsel and the Respondents filed a motion to correct the transcript in two respects. The motion is hereby granted. The General Counsel and the Respondents also filed briefs, which I have considered in my determination of this matter.

Upon the entire record in this case, and from my observation of the witnesses and their demeanor, I make the following:

*Findings of Fact*

I. The Business of the Employers

The seven corporations named in the amended complaint are duly organized and authorized to do business by the laws of the State of Illinois. Scholle Chemical is engaged in the manufacture and sale of nitro cellulose base solution and other related products. It and two other of the corporations, Scholle Container and Scholle Northlake, are the only Scholle entities which employ any hourly paid employees at the plant which they occupy in Northlake, Illinois. The three corporations have the same directors, president, executive vice-president, secretary and treasurer, as well as the same personnel manager who administers a common labor relations policy on their behalf.

During the past calendar year, Respondents have manufactured and shipped goods and products valued in excess of $50,000 from Northlake, Illinois to points outside the State of Illinois, and have purchased and had delivered

to the Northlake plant goods and materials valued in excess of $50,000 from states other than Illinois.

Based on the foregoing, I find that Scholle Chemical, Scholle Container and Scholle Northlake constitute a single employer which is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

I shall hereafter refer to these three corporations collectively as Scholle, and when they need to be differentiated, as Chemical, Container, and Northlake. As the other four corporations had no hourly rated employees at the Northlake plant, and as the General Counsel has not shown their participation in, or their connection with, the events described below in any manner, I hereby grant the motion of Respondent's counsel to dismiss the complaint as to them.

## II. The Labor Organization Involved

The Union is a labor organization within the meaning of Section 2(5) of the Act.

## III. The Unfair Labor Practices

### *The Complaint and the Issues*

The complaint alleges that Scholle violated Section 8(a)(1) by (1) interfering with union officers and agents who were distributing literature to Scholle employees at the entrance to its plant and parking lots on October 31, 1969; (2) by threatening, on the same date, the union officers and agents with arrest and prosecution for trespass if they persisted in distribution of literature and solicitation of employees at the location described above; and (3) by refusing, in a letter of December 2, 1969, a request of a union official for permission to distribute union literature at the Scholle plant entrances.

The only access to the Scholle plant and its parking lots is through a private road owned and maintained by another employer in the area, Automatic Electric Company. That company prohibits all solicitation or distribution of material on its private road. The question to be decided is whether, under the circumstances here, Scholle may validly deny to nonemployee union organizers access to its property for purposes of distribution of literature and oral solicitation of its employees.

*Railroad Avenue and its Adajcent Area*

The Scholle plant is located in Northlake, Illinois, a suburb of Chicago, close to the intersection of North Avenue and Railroad Avenue. North Avenue is a major thoroughfare and state route running east and west through Chicago and certain of its western suburbs. It has a posted speed limit of 40 miles per hour. Its average traffic load in both directions is about 38,000 vehicles per day. The private road owned by Automatic Electric is known as Railroad Avenue. It runs north of North Avenue, perpendicular to it, and dead-ends into the parking lots of Automatic Electric. Railroad Avenue is a paved, three lane highway, posted for a 30 mile per hour speed limit. There are traffic control lights at the intersection of North and Railroad Avenues. Traffic and other signs on Railroad Avenue are owned by Automatic Electric.

The Scholle plant area is on the west side of Railroad Avenue. Between North Avenue and the Scholle plant buildings is an unpaved strip of state owned property about 50 feet wide, an unpaved strip of Scholle property about 170 feet wide and a parking lot about 100 feet wide. These are all south of the plant. North of it is another Scholle parking lot, while in front of the plant and its main entrance, facing Railroad Avenue is another park-

ing area for about 30 cars. Behind the Scholle property on the west are railroad tracks, running parallel with Railroad Avenue.

Also on the west side of Railroad Avenue and to the north of the Scholle property are buildings and parking areas of three other employers. On the east side of Railroad Avenue but without access to it is a residential area, and immediately north of that is the plant and parking lots of Automatic Electric.

Scholle employs about 350 people at its Northlake plant and Automatic Electric about 11,000, most of whom arrive and leave by private automobile. The official of Automatic Electric who is in charge of plant engineering and security, including supervision of its parking lots, estimated that about 40 percent of its employees use Railroad Avenue in entering or leaving the parking lots.[4]

Of Automatic Electric's factory and office employees, about 7600 work on the day shift, with starting times staggered from 6:30 to 8:30 a.m. That shift leaves from 3 to 5 p.m., just as the second shift of about 1800 employees comes to work. A smaller third shift reports from 11 p.m. to 12:30 a.m., and leaves as the day shift comes in.

Of the Scholle entities, Chemical and Northlake operate only a day shift, from 7:30 a.m. to 3:50 p.m., with about 50 employees, while Container has 3 eight-hour shifts and a fourth overlapping shift of about 6 hours, which together employ about 300 workers. Container day shift employees number about 130.

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[4] The lots can also be entered from Wolf Road, a public road east of the Automatic Electric plant and parallel with Railroad Avenue. The lots are closed off during hours when employees are not entering or leaving the plant, so vehicles are unable to use them as a link for any through movement of traffic via Railroad Avenue.

Thus, Scholle's employees on all shifts report to and leave work in the stream of those Automatic Electric employees who also use Railroad Avenue in coming to and leaving work. Taking the day shift as representative for all shifts, the Scholle employees who turn off North Avenue onto Railroad Avenue in their private cars are a small percentage of the total traffic carried by that road, roughly 180 as compared to about 3000, the number of Automatic Electric day shift employees who use Railroad Avenue. There is no way to distinguish the two groups as their cars turn north onto North Avenue from both directions, to enter Railroad Avenue. Furthermore, as the day shifts end and the second shifts report, it is obvious that many hundreds of cars are entering or leaving Railroad Avenue within a relatively short period of time.

*The Union's Efforts to Organize Scholle Employees*

Attempts at Handbilling

Hall, an International Representative of the Union, met two Scholle employees on October 30, 1969, to discuss possible organization, and it was decided that Hall would distribute some union literature at the plant. Hall and another Union representative, Ryan, arrived at the plant the next day about 3 p.m. Hall stood near the plant's main entrance, in the small parking area directly in front of the building, while Ryan stood at the entrance to the north parking lot. They spoke with employees and passed out envelopes containing a handbill and authorization card for 5 or 10 minutes when several men came out of the main entrance to talk with Hall. One of them was Pettinger, Scholle's personnel manager, who, after some preliminary conversation, advised Hall that Railroad Avenue was a private road and that distribution of literature was prohibited on it. Another man, Mascarella, a Scholle supervisor, then approached and repeated that Railroad Avenue was a private road. Mascarella is a part-time

officer in the Northlake Police Department, and in response to Hall's vocal doubts that Railroad Avenue was private, showed him his police badge. There is some conflict in the testimony of Hall, on the one hand, and Pettinger and Mascarella on the other, as to whether the latter threatened Hall with arrest for trespass, intimated that trespassers were subject to arrest, or merely identified himself and directed Hall to the Northlake town hall where he might satisfy himself that Railroad Avenue was a private road.

In any event, Hall and Ryan left the parking area and stood on the 50-foot strip of unpaved State property at the northwest intersection of North and Railroad Avenues to assess the feasibility of handbilling from there. They felt it would not be productive because of the heavy traffic on Railroad Avenue and the impossibility of telling which of the cars passing by contained Scholle employees.

Hall met again with his two employee contacts on November 6, and reported his lack of success. He asked them about arranging a meeting with other employees and about obtaining a mailing list. One of the employees suggested that he come out to the plant early on Veteran's Day, when officials might not be around. Hall did so from 6:30 to 7:30 a.m., stood near the plant entrance, and was able to pass out about 120 handbills. Two days later Hall again met his employee contacts who brought him an old Christmas mailing list, which they decided was useless because it was out of date and contained mainly supervisors' addresses.

On November 21, Hall sent Scholle a letter requesting access to the plant entrances for distribution of leaflets, and on December 2, Pettinger responded, asking him to refrain from using the private road (Railroad Avenue) for distribution. Pettinger also pointed out that "traffic conditions are intense on this road during the hours of

change of shift," something which Hall had already discovered for himself on October 31. Pettinger also noted that in the past, organizers and picketers had respected the private ownership of the road and had remained on the public domain of North Avenue. Pettinger closed his letter by a formal offer of further assistance or information if needed. On January 12, Hall again wrote Pettinger asking him to supply the Union with a list of names and addresses of all current hourly rated Scholle employees, but he never received an answer.

Hall did not go out again to the plant until April 12, 1970, when Automatic Electric employees were on strike. Hall figured he would therefore be able to contact only Scholle employees. He stood on the public area, just at the intersection of North and Railroad Avenues, trying both the east and west sides of Railroad Avenue for over 2 hours, overlapping shift changing time. He was unable to get anyone to stop or to accept a handbill. Hall tried again the next morning at the same spots but was able to get only 5 handbills accepted out of the hundreds of cars passing by.

Mailings to Employees

As of December 5, 1969, Hall had obtained only 12 signed authorization cards. On that date, he sent letters to the card signers, telling them that he had filed charges with the Board and that he would be phoning them soon in order to arrange to meet them. As a matter of fact, Hall did call all of them but was never able to get to see anyone except his two original employee contacts.

On January 28, 1970, Hall sent a letter to about 40 employees asking them for help in compiling a complete mailing list of employees, enclosing an authorization card and self-addressed envelope. The same letter was later mailed

to additional employees. On February 12, Hall sent another letter, this time to about 70 employees, saying that their names had been suggested by a fellow employee as being possibly interested in organization, and again enclosing authorization cards. On February 24, Hall sent another letter to 120-150 Scholle employees, inviting them to sign cards and asking for the correct addresses of 16 named employees, previous letters to whom had been returned. On March 30, Hall sent another letter to 200-220 employees, again enclosing authorization cards and asking for names and addresses of other employees.

There is no evidence in the record as to how Hall came into possession of the names and addresses of those to whom his letters from January through March were mailed, but it is probable that they came from the letter solicitations. Hall testified that he was never sure of the accuracy either of their names or addresses, and it is obvious that some of the addresses were in fact incorrect. On the other hand, I must assume that as the mailings become larger, more employees in fact were being reached by that means. At best, however, Hall was never able to get the names and addresses for more than about 220 employees out of 350 and could not be certain how many of these were correct.

Of the Scholle employees about 27 percent live in Northlake, the town where the plant is located. About 58 percent live in other Chicago suburbs, and 15 percent live in Chicago.

Other Possible Means of Reaching Employees

The Respondent introduced evidence to show that service and charitable organizations, such as the Kiwanis Club have used the intersection of North and Railroad Avenues to sell articles to, or to solicit contributions from

passing motorists, using solicitors who wore brightly colored ponchos, with identifying insignia. The solicitors walk between lanes of cars which are waiting for the traffic signal to change, step off the median strip on North Avenue to approach drivers, and stand in or near the turning lane. All this has been done to the financial success of the organization without intruding onto Railroad Avenue. The solicitation is done one day each year, and the witness who did the job at North and Railroad Avenue intersection testified that there were five solicitors strategically placed there for about 2 hours to approach as many motorists as possible between traffic light changes.

Respondent also brought out through Hall that the Union had not attempted to communicate with Scholle employees by newspaper or radio advertisements or announcements, by distributing bumper stickers, by carrying or wearing identifying placards, by using an airplane with a streamer behind it, by ascertaining license numbers of vehicles used by Scholle employees, or by using loudspeakers to attract their attention.

### Solicitation Inside the Plant

Hall was apparently unable to get any Scholle employees to undertake any distribution of union handbills inside the plant or on the parking lots. Whether this was because of a lack of employee interest, or fear, is impossible to say. During the last day of the hearing, while General Counsel was cross-examining Pettinger, Scholle's personnel manager, he testified that Scholle had a rule against employee solicitation within the plant and on its property. The rule was contained in a foreman's handbook but was also given to employees on some basis not fully developed on the record. On the strength of Pettinger's testimony on this point, the General Counsel moved to

amend the complaint to allege as an additional violation of Section 8(a)(1), the promulgation and maintenance of a rule prohibiting employees from soliciting on behalf of a labor organization or from distributing literature on Respondent's property at any time.

Respondent objected to the amendment, and I denied the General Counsel's motion to amend, even though I was satisfied that the matter was within the general scope of the charge. I did so because Pettinger's testimony referred to new matter which, if it were to be fully litigated, would have entitled Respondent to a postponement of the hearing in order to defend itself properly. It also seemed to me to be outside the general theory of the complaint, namely, that nonemployee union organizers had no reasonable means of communicating with employees unless they could speak with them and distribute literature to them on the private property of either Scholle or Automatic Electric.

Oral solicitation or distribution of union literature undertaken by employees in the employer's plant or on its parking lot is governed by different principles and rules, relating to nonworking areas and nonworking time, than those applicable to solicitation or distribution by nonemployees outside industrial plants. Whether nonemployee organizers may be prohibited from entering on private property to distribute union literature cannot depend on whether there is also in effect an invalid employer rule against employee solicitation or distribution. In fact, up to the point when Pettinger revealed the existence of a possibly invalid rule against solicitation and distribution by employees, the General Counsel was trying the case on the premise that Respondent was improperly barring nonemployee organizers from private property re-

gardless of the nonparticipation by employees in the union's organizing activities. In sum, I thought then, and still do, that this case should not have been further prolonged to try a new allegation which could not affect its ultimate resolution.

*Analysis and Conclusions*

The General Counsel and Respondent agree that the Supreme Court's decision, *N.L.R.B.* v. *Babcock & Wilcox Company*, 351 U.S. 105 sets out the standards which determine the legality of an employer's posting his private property against its use by nonemployee organizers who are attempting to communicate with his employees. Each quotes from the decision those portions which best fit its view of the facts, and in the interests of impartiality, I set out below the parts quoted by either party, with connecting language.

> It is our judgment, however, that an employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution. In these circumstances the employer may not be compelled to allow distribution even under such reasonable regulations as the orders in these cases permit.
>
> This is not a problem of always open or always closed doors for union organization on company property. Organization rights are granted to workers by the same authority, the National Government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other. The employer may not affirmatively interfere with organization; the union may not always insist that the

employer aid organization. But when the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize.

* * * The right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others. Consequently, if the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them, the employer must allow the union to approach his employees on his property. No such conditions are shown in these records.

The plants are close to small well-settled communities where a large percentage of the employees live. The usual methods of imparting information are available. See, e.g., note 1, *supra*. The various instruments of publicity are at hand. Though the quarters of the employees are scattered they are in reasonable reach. The Act requires only that the employer refrain from interference, discrimination, restraint or coercion in the employees' exercise of their own rights. It does not require that the employer permit the use of its facilities for organization when other means are readily available. (351 U.S. 105, 112-113.)

The Board has applied the principles of *Babcock & Wilcox* to a few cases where, as here, the issue was an employer's right to prohibit the distribution of union literature by nonemployee organizers within an industrial tract in a metropolitan area.[2]

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[2] Cases involving organization by nonemployees at resort hotels, lumber camps, company towns, company housing, shopping centers or retail stores, with their surrounding parking areas, present some aspects of the limited issue here, but are sufficiently distinguishable that they need not be discussed further.

In *General Dynamics*, 137 NLRB 1725, a large industrial tract in Rochester, New York, bounded by public streets but bisected by a private road, was owned and wholly occupied by a single employer. The tract had five entrance gates, one of which opened onto a public street, and two of which were reached from the intersection of a boundary public street with the private road. These two entrances were the most heavily trafficked means of ingress to the plant area and were used daily by a little less than half of the total employee complement of 4500 employees. The Union engaged in handbilling at all five plant entrances, being barred by the employer from distribution only on the private road itself. The private road was clearly posted as such and had never been dedicated as a public street, although for the convenience of the public, the employer permitted limited use of its road as a passageway between the public streets at each end.

The Board, reversing the Trial Examiner, upheld the employer's right to bar union distribution of handbills on the private road itself, finding that the employees were not beyond the reach of reasonable union efforts to communicate with them. The Union could do so, according to the Board, by handbilling employees in automobiles on the two public streets at the intersection with the private road, as well as those employees who walked to work or used public transportation. The Board also pointed out that the Union had been able to visit employees in their homes and to reach them by mailings during its 4 year campaign.

The second Board case involving distribution of union literature by nonemployees within an industrial tract is *Solo Cup Company and Calumet Industrial District Company*, 172 NLRB No. 110. Here, the tract within which Solo's plant was located included a private street owned by Calumet. The only way to communicate with Solo's

employees, without entering on Calumet's property, was to pass out handbills to the employees at the intersection of the private street and the boundary public highway. The Board found that it was virtually impossible to stand safely at this intersection and successfully pass out literature of any kind because cars approaching the intersection turned both right and left onto the private street.[3] The Union also had no list of addresses of employees, so that it could not reach them by letter. Further, the Board said, even assuming that cost was no object, the Union would have a problem communicating with Solo employees in view of the large number of newspapers, and radio and television stations operating in Chicago and its surrounding area. The Board therefore found that the Union was not reasonably able to reach Solo's employees through other available channels of communication, and that the Respondents' rule of absolute exclusion of union organizers from their premises was invalid.

The Board also held in that case that the entire industrial tract, including the private road, had become a quasi-public area because there were no indications that access to the property was barred by Solo or Calumet to the general public other than union organizers. The Board analogized the situation to that of a privately owned suburban shopping center, which is the "functional equivalent" of a "normal municipal business district" with unrestricted rights of access to the property on the part of the public. The Board based this analogy on the Supreme Court's decision in *Amalgamated Food Employees Union Local 590 et al.* v. *Logan Valley Plaza, Inc.*, 389 U.S. 911, in which

[3] From the figures given in footnote 1 of the Board's decision, it can be presumed that traffic at the intersection of the private and public roads was much lighter than, in the instant case, at the intersection of North and Railroad Avenues.

the Court held that a privately owned shopping center to which the public was invited, could not exclude nonemployees who sought to peacefully picket and distribute literature on the premises.

The Board thereupon ordered both Solo and Calumet to grant access rights to union organizers on the outside of the plant premises located in Calumet's industrial tract. (Although it does not state so explicitly, the decision seems to mean that the union organizers would have a right of access to Calumet's private road as well as to the parking lots used by Solo employees.) After the Board instituted enforcement proceedings against Solo and Calumet, the latter agreed to comply with the Board's Order by allowing union organizers to solicit employees on the private road.

The Court of Appeals then refused enforcement of the Board's order against Solo, holding that the industrial district was not the functional equivalent of either a municipal business district or of a shopping center, since it did not hold itself out as being open to the public, nor did the public have any reason to enter the area. Since the industrial tract was not quasi-public, Solo committed no discrimination against nonemployee organizers by barring them from its property. Furthermore, the Court held that the Union now had a reasonable means of soliciting Solo employees on the private road since they were readily distinguishable from other employees in the area because they were the only ones whose quitting time was 2 p.m. The Court therefore saw no necessity to allow nonemployee organizers to solicit employees on the steps of the Solo plant or in their parking lot.[4]

The Court remanded the case for modification of the Board's order as to Solo, in accordance with its opinion,

[4] *N.L.R.B.* v. *Solo Cup Co.*, 422 F. 2d 1149 (C.A. 7).

and this has since been done, 182 NLRB No. 101. The revised order requires Solo not to interfere with union solicitation of its employees "on property other than that which it leases from the Calumet Industrial District Company." I presume this means that distribution by nonemployees may be barred in Solo's parking lot and at the entrances to its plant.

As for the Board's finding in *Solo Cup* that the Calumet Industrial District is a quasi-public area, I am bound thereby, despite the holding of the Court of Appeals to the contrary,[5] since the public's access or use of the Calumet tract is not significantly different from that in the instant case. Although in neither case can the private road be used by automobiles as a connection between public highways, yet certain governmental services, such as police, fire and mail were provided or available, while employees of business organizations furnishing services to the industrial firms within the tract were freely permitted to enter.

In any event, the Board's reliance on the quasi-public nature of the industrial district in *Solo Cup* is in fact subordinate to its primary holding, that nonemployee organizers were not able to reach Solo's employees other than by communicating with them within the industrial tract.

In *Solo Cup,* the owner of the private road within the industrial tract, Calumet, was joined as a Respondent, and its eventual compliance with the Board's order granting union organizers the right to distribute literature to Solo's employees on the private road gave the union in effect a reasonable method of communicating with them. In the present case, however, Automatic Electric, which owns Railroad Avenue, was not joined as a Respondent. Its

[5] See *Iowa Beef Packers, Inc.,* 144 NLRB 615, 616.

policy prohibiting any solicitation or distribution on Railroad Avenue is not under attack here, nor can an order be issued against it. The Union is thereby foreclosed from contacting Scholle employees on the only access road leading to their place of employment. The General Counsel recognizes this by making no contention that the Union organizers should be allowed on Railroad Avenue, arguing rather that they should be allowed on Scholle's private property, at or near the plant entrances or, in the alternative, in its parking lots or at their entrances.

Granting then, that the Union had no justification for demanding the privilege of distributing literature on Railroad Avenue in view of Automatic Electric's nondiscriminatory ban on all distributions or solicitations on its private property, what means did it have to bring its message to Scholle employees? For direct handbilling, as one available channel of communication, Scholle would relegate the Union to the public part of the intersection of North and Railroad Avenues. It also argues that the Union had additional means available to it—the names and addresses of about 220 of its 350 employees, which the union could use to reach them by mail, telephone or home visiting. It compares these available means to those which the union had at the Babcock & Wilcox plant, where the Supreme Court noted the Board's finding that the union had mailed its literature to over 100 of the 500 employees in that plant, had talked to them on the streets of the town nearest the plant, and had visited and phoned them at their homes.

The differences however, as to the relative accessibility of the employes at the Babcock & Wilcox plant, and in this case, is that in the former, the plant was close to small, well-settled communities where a large percentage of the employees lived. Here, although the plant is located in

a small town, Northlake, the town itself is only a small segment of the complex, widespread Chicago metropolitan area with a population of more than 5 million. Although about 25 percent of the employees live in Northlake itself, fairly close to the plant, neither they nor the 75 percent of the employees who live in Chicago or other suburbs can be approached in the informal manner possible in small towns which are located in rural areas. The impersonality and isolation of living in a large metropolitan area makes it extremely difficult to reach employees away from their place of employment.

Nor can the Union effectively reach the employees with literature or by oral solicitation at the intersection of North and Railroad Avenue. It cannot identify the Scholle employees, since they enter and leave Railroad Avenue among the thousands of cars and employees who are coming to or leaving the Automatic Electric parking lots at about the same time, nor can it even pass out handbills at the intersection without running inordinate risks to the physical safety of its organizers as well as disrupting traffic and hazarding collisions if car drivers slow down to accept its handbills.[6]

Furthermore, unlike the situation in *General Dynamics, supra,* none of the Scholle plant entrances face a public road where distribution to at least some employees would be possible, nor can the Union direct its efforts to reaching only Scholle employees, by distributing handbills to all cars as they enter or leave the private road. The prob-

[6] The fact that the Kiwanis peanut vendors solicit for two hours or so once a year does not prove that they do not run the same risks, but only that they are willing to take these risks in order to accomplish their limited goal of indiscriminate solicitation of every car moving on North Avenue during those few hours.

lems in communicating with employees which the Union faces here are much more like the union's problems in *Solo Cup* than they are with those in *General Dynamics*. Here, as in *Solo Cup*, the industrial tract is the work place for employees of many employers; the traffic problem is the same in that there is only one means of automobile ingress to the property, with a heavy surge of traffic at the beginning and end of every shift; while the lack of any reasonable means of reaching the employees away from their place of employment is the same.

I therefore hold, on the authority of *Solo Cup*, that Scholle's normal right to post its property against non-employee distribution of literature must be accommodated to the Union's right to inform the employees of the advantages of self-organization.

*Other Allegations of the Complaint*

A second allegation is that Scholle violated Section 8 (a)(1) by threatening the union organizers with arrest and prosecution for trespass on October 31, 1969, if they persisted in their distribution efforts on Scholle's private property. I find that Mascarella's announcement that he was a police officer and that Hall was a trespasser on Scholle property and on Railroad Avenue placed Hall in fear of arrest and prosecution. However, Hall was, indeed, trespassing and Mascarella's warning was not excessive under those circumstances. This was the date of Hall's first visit to the plant. The Union had made no earlier attempt to reach the employees other than by soliciting on private property, and it was therefore uncertain whether the union should be accorded the privilege of encroaching on Scholle's dominion over its property under the principles of *Babcock & Wilcox*. On this initial visit of the union organizers, Scholle was justified in

pointing out that they were on private property and forbidding distribution of their literature. I therefore recommend dismissal of this allegation of the complaint.

A third allegation relates to the charge that Scholle refused Hall's request of December 2, 1969, for permission to distribute literature at its plant entrances. The refusal was simply an aspect of Scholle's contention that it was under no obligation to allow its property to be used in the Union's organizing efforts. Since I have found to the contrary, and since my proposed order will provide access for the Union to the Scholle parking lots and building entrances, I see no need to regard the allegation as stating a separate offense, or as requiring any additional remedy.

Accordingly, I find that Respondent interfered with the rights of its employees under Section 7 of the Act by denying the Union organizers access to its premises for the purposes of distributing literature, otherwise communicating with the employees, and soliciting membership in the Union.

*Conclusions of Law*

1. Scholle Chemical Corporation, Scholle Container Corporation and Scholle Northlake Corporation constitute a single employer which is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Oil, Chemical & Atomic Workers International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By refusing to permit the Union's nonemployee organizers to distribute leaflets and handbills and to solicit Scholle employees within its parking lots, Respondent has interfered with, restrained, and coerced its employees in the exercise of their rights guaranteed in Section 7 of the

Act, thereby engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) of the Act.

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in this case, I make the following:

## RECOMMENDED ORDER

Scholle Chemical Corporation, Scholle Container Corporation, and Scholle Northlake Corporation, their officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Prohibiting or interfering with nonemployee Union organizers in distributing union literature and in soliciting union adherence or membership, in its parking lots and parking areas at points reasonably adjacent both to their entrances from Railroad Avenue and to plant entrances for employees.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action, which it is found will effectuate the policies of the Act:

(a) Allow Union organizers to distribute union literature and to solicit union adherence or membership, at points within its parking lots and parking areas which are reasonably adjacent to Railroad Avenue and to employee entrances to the plant.

(b) Post at its plant in Northlake, Illinois, copies of the attached notice marked "Appendix." Copies of said

notice[7] on forms provided by the Regional Director for Region 13 shall, after being duly signed by an authorized representative, be posted by Respondent immediately upon receipt thereof, and be maintained by it for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced or covered by any other material.

(c) Notify the Regional Director for Region 13, in writing, within 20 days from the receipt of this Decision, what steps it has taken to comply herewith.[8]

Dated at Washington, D.C. August 11, 1970.

*Milton Janus*
Milton Janus
Trial Examiner

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[7] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, recommendations, and Recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes. In the event that the Board's Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

[8] In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

## NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL allow organizers and agents of OIL, CHEMICAL & ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO, to distribute their literature and to solicit the support of our employees in our parking lots and parking areas at points which are reasonably close to Railroad Avenue and to the employee entrances to our plant.

All our employees are free to become, or to refrain from becoming, members of any labor organization.

SCHOLLE CHEMICAL CORPORATION
SCHOLLE CONTAINER CORPORATION
SCHOLLE NORTHLAKE CORPORATION
Employers

Dated ..... By .....
(Representative) (Title)

FILED
JUL 31 1973
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973.

**No. 73-66**

SCHOLLE CHEMICAL CORPORATION, SCHOLLE CONTAINER CORPORATION AND SCHOLLE NORTHLAKE CORPORATION,

*Petitioners,*

*vs.*

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

## BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973.

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*Petitioners,*

*vs.*

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

---

## BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION.

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### INTEREST OF THE AMICUS CURIAE.*

This brief is filed on behalf of The Chamber of Commerce of the United States of America, a federation consisting of a membership of over thirty-seven hundred (3700) state and local chambers of commerce and professional and trade associations, a direct business membership in excess of thirty-eight thousand (38,000), and an underlying membership of approximately five million (5,000,000) business firms and individuals.

* Pursuant to Rule 29, F. R. A. P., there have been lodged with the Clerk of the Court the written consents of the parties to this proceeding to the filing of this brief *amicus curiae*.

It is the largest association of business and professional organizations in the United States.

In order to represent its members' views on questions of importance to their vital interests and to render such assistance as it can to courts' deliberations in such areas, the Chamber has frequently participated as *amicus curiae* in a wide range of significant labor relations matters both in the United States Supreme Court and the Courts of Appeals. Examples of cases recently decided by the Supreme Court in the area of labor relations in which the Chamber has appeared include *N. L. R. B.* v. *Pittsburgh Plate Glass Co.*, 404 U. S. 157 (1971); *Boy's Market* v. *Retail Clerks Union*, 398 U. S. 235 (1970); *N. L. R. B.* v. *Burns International Security Services, Inc.*, .... U. S. ...., 80 LRRM 2225 (1972); *H. K. Porter Co.* v. *N. L. R. B.*, 397 U. S. 99 (1970); *Sears, Roebuck and Co.* v. *Carpet Layers, Local 419*, 397 U. S. 655 (1970); and *Los Angeles Herald Examiner* v. *Kennedy*, 400 U. S. 3 (1970).**

The instant proceeding is of particular concern to the Chamber's members, as well as to employers generally, since it involves a question of theoretical significance in the administration of the National Labor Relations Act which also has enormous practical importance in employers' right to control the use of their private property. Thus, this case presents for decision a balancing between unions' assertion of statutory rights and employers' assertion of conflicting Constitutional guarantees. The importance of these issues, which frequently recur to jeopardize the Chambers' members' interests and their Constitutional guarantees, impels the Chamber to submit its view for the consideration of this Court.

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** During the Supreme Court's 1972 Term, the Chamber has also participated as *amicus curiae* in *N. L. R. B.* v. *Granite State Joint Board, Textile Workers Union of America, Local 1029, AFL-CIO*, No. 71-7111; *N. L. R. B.* v. *International Van Lines*, No. 71-895; *Sid Harvey Inc. and Sid Harvey Brooklyn Corp.* v. *Local 810, et al.*, No. 72-556; *Phelps Dodge Corporation* v. *AFL-CIO Joint Negotiating Committee for Phelps-Dodge Corporation, et al.*, Nos. 72-220, 72-359; and *Terminal Freight Cooperative Association, et al.* v. *N. L. R. B.*, No. 72-501.

## REASONS FOR GRANTING THE WRIT.

### Introduction and Summary.

The extent to which employers must make their private premises available to unions seeking to organize their employees constitutes a serious and recurring problem in the interpretation of the National Labor Relations Act. The general test to measure the legality of an employer's rejection of a non-employee's request to distribute literature on his property is set forth in *NLRB* v. *Babcock & Wilcox Co.*, 351 U. S. 105 (1956). There, this Court struck a balance between the right of an employer to control or limit the uses of his property and the competing right of employee self-organization which depends "in some measure on the ability of employees to learn the advantages of self-organization from others." In resolving that conflict this Court held that: "It is our judgment, however, that an employer may validly post his property against non-employee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message . . ."

In applying this general test, the Board and the lower courts must consider the range of available channels of communication, evaluating their effectiveness in combination. Unless, in the unusual case, it is clear from objective facts that utilization of these channels would necessarily be ineffective to reach employees, the Board and the courts must affirmatively require the union to exercise reasonable efforts to utilize these channels and then to show that despite these efforts employees are and will remain inaccessible, before permitting the union to solicit employees on private property. That is, before an employer should be compelled to open its property to non-employee organizers, the union must establish that, even by exercising reasonable efforts through other available channels of communication, it is nonetheless unable effectively to reach employees with its message.

While in obedience to *Babcock* this test has been employed by the Eighth Circuit in *Central Hardware Co.* v. *NLRB*, 468 F. 2d 252 (8th Cir. 1972) (on remand from 407 U. S. 539 (1972)) and by the Ninth Circuit in *NLRB* v. *Sioux City and New Orleans Barge Lines, Inc.*, 72-1059 (decided February 2, 1973) the court below, however, although purportedly relying upon *Babcock*, employed a quite different and inconsistent test. This has resulted in a conflict among the Circuits in connection with the resolution of this oft-recurring problem under the National Labor Relations Act. Specifically, the court below compelled no affirmative duties from the union as did the Eighth and Ninth Circuits, failed to consider the existence and effectiveness of the available means of communication which the union had not even begun to utilize, and required that an employer's property rights must yield to a union's organizational interests whenever the use of alternatives to the employer's property appeared less efficient, sure and convenient than would access to that property.

Apart from its disagreement with the other Circuits, the Seventh Circuit decision simply nullifies the criteria enunicated in *Babcock*, because an employer's premises will almost invariably be the most efficient, sure and convenient access to its employees. But, as the Eighth Circuit said in *Central Hardware*, "this falls far short of meeting the Union's burden of establishing that no reasonable means of communication existed other than solicitation on the parking lot." The Seventh Circuit's test, unlike the test in *Babcock* which was properly applied by the Eighth and Ninth Circuits, requires, in effect, that the employer aid the union's organizational activities and that the union be able to impart its message to employees in the most preferred manner, *i.e.* from the employer's premises. In order to resolve the manifest confusion among the Circuits as to the nature of the test to be applied in this recurring problem, this court should grant *certiorari*.

An additional reason exists for this Court to review this case. The circumstances under which a union may enter upon private property to solicit during an organizational campaign have been significantly changed by the Board's *Excelsior* rule and the even more recent emphasis on elections to determine representative status. The *Excelsior* rule was enunciated by the Board in *Excelsior Underwear Inc.*, 156 NLRB 1236, in 1966, ten years after *Babcock*. There, the Board ruled that an employer must furnish a union with the name and address of each unit employee after an election is scheduled and not less than ten days before the election. Coupled with the policy that elections are the preferred method to determine representative status, the *Excelsior* rule guaranteed a union access to each unit employee during the election campaign. The *Excelsior* rule accomplished a purpose of *Babcock* by assuring the right of unions to reach employees with their message. It is therefore appropriate to interpret the requirements of *Babcock* in light of *Excelsior*.

## ARGUMENT.

### I.

### The Failure of the Court Below to Apply a Rule Adequately Recognizing the Existence of Alternative Means of Communication Violates This Court's Babcock Test and Creates a Conflict Among the Circuits.

In *Babcock*, this court stated that the Act "does not require that the employer permit the use of its facilities for organization when other means are readily available." Here, during the organizing campaign, the union possessed a list containing the names and addresses of approximately 60% of the employees in the proposed bargaining unit. While the court below emphasized the fact that the union was not certain of the accuracy of each of the names and addresses on its list and heavily relied upon this to permit the union to organize on the employer's

property, here, too, that court is in direct conflict with the Eighth Circuit which stated in *Central Hardware Co., supra,* in a fashion consistent with *Babcock*, that "The burden was not on the company to show that conventional means of communication and access were open, but the contrary burden rests with the General Counsel." Mailings and home visits constitute conventional means of communication and presumptively present an opportunity to reach employees other than on the employer's premises. In order to prove that there is no opportunity to reach employees other than by solicitation on private property, the union, in obedience to the *Babcock* test, had to establish that the list was inaccurate, and this the union did not do. The union's stated uncertainty of the accuracy of the employees' names and addresses is not equivalent to required affirmative proof that the list was inaccurate and that despite utilizing the list, employees were inaccessible. The Seventh Circuit's reliance upon this assertion is totally misplaced and resulted from a misapplication of the *Babcock* test.

Though the effectiveness of channels of communication should be evaluated in combination, the union here, by possessing a presumptively accurate list of employees had a readily available means to reach these employees by letter or home visit, irrespective of the availability of any other avenue of communication. The court below failed to obey the *Babcock* test when it held that the employees remained inaccessible and that the union therefore could use the employer's premises for organizational purposes.[1]

In obedience to the *Babcock* test, the Board itself in *The Falk Corporation*, 192 NLRB No. 100 (1971) and in *Monogram Models Inc.*, 192 NLRB No. 99 (1971), has declined to

1. Though the union here possessed the names and addresses of 60% of the unit's employees, practically, far fewer than 60% need to be reached by direct communication in order for the union's message to be disseminated to all, because it is reasonable that employees who are confronted with a union campaign will exchange with one another views and information relating to the advantages or disadvantages of selecting the union.

permit union organizers to have access to the employer's private property under the circumstances of those cases, although the union had a list of only 25% of the unit complement in *Falk* and no list in *Monogram*. Given the results of those cases, the same result should have followed here *a fortiori*.

Though *Babcock* involved a community of 21,000 people, while the employer here is located in the Chicago metropolitan area, the employers in *Monogram*, *Falk*, and *Central Hardware* were located in metropolitan Chicago, Milwaukee, and Indianapolis, respectively. Not only is there nothing unreasonable in expecting a union to attempt to reach employees at their homes, particularly when, as here, it possessed a list containing the names and addresses of a significant percentage of these employees, but also, the Eighth Circuit in *Central Hardware*, rejected the invitation to adopt a "big city" rule and a different small town rule in applying *Babcock*. Rather, that court, quoting *Monogram*, stated that the location of the plant in a metropolitan area does *not* itself justify the conclusion that employees were beyond the reach of reasonable union efforts to communicate with them other than on the plant premises. Thus, the court below conflicts with the Eighth Circuit by effectively adopting such a "big city rule" and incorporating in such a rule a disregard for other available means of communication with employees.

Here, then, the presumptively accurate list of names and addresses possessed by the union, during its organizational campaign constituted an available means to communicate with these employees at least by mail or visits, under the *Babcock* test, so that the employer could validly post his property against union solicitation.

Moreover, and still more significantly, there were here other effective avenues for communication that were unexplored by the union and inadequately considered by the court below. The record in this case reveals that no or scant efforts were made by the union to reach employees either by radio, newspaper, organization meetings, telephone or otherwise. While the law

will not impose on parties the duty to engage in futile acts, the union here has not met its burden under *Babcock* to show that the use of these other alternatives would have been futile. Such alternatives may not have been as convenient or as sure or as inexpensive as the invasion of private property for direct personal contact, but the law requires only that the other avenues of communication be reasonably effective, not that they be in all respects comparable to solicitation on the employer's property.

It is not sufficient for the union here to merely assert that conventional methods of communication such as the radio or newspaper were not feasible because the employees involved live in a large metropolitan area. As noted *supra*, such an assertion was rejected by the Board in *Monogram*, where the employer was located in the Chicago metropolitan area just as the employer here, and was rejected by the Eighth Circuit in *Central Hardware*, citing *Monogram*, which found that the mere fact that employees lived in a metropolitan area did not justify the conclusion that the employees were inaccessible or that reasonable attempts to communicate with them would be ineffective; indeed, the Eighth Circuit expressly recognized that the union had open to it many of the conventional means of communication, including mail, telephone, and personal contacts.

Thus it should have been considered by the court below, properly interpreting *Babcock*, as fatal to the union's case that it failed to exercise reasonable efforts to utilize avenues of communication available to it, including advertising in local and metropolitan newspapers, on the radio during hours when employees would be driving to and from work, or on local television programs.

As an indication of such means which the unions have successfully employed, with only a slight exercise of diligence and ingenuity, we refer the Court to a study made in 1967 of the activities of the Retail Clerks Union, as revealed in editions of its magazine, "The Retail Clerk's Advocate." Not all such

devices or alternatives would be appropriate in this or any case, but they reveal what can be achieved by a union which is willing to accept its duty to seek out effective means of communication. Those means included, for example, a consumer boycott involving the use of balloons and bumper stickers (June, 1967, page 3); announcements on national television (July, 1967, page 18), at state and county fairs, holiday celebrations and other festivals (October, 1967, page 12); extensive distribution of shopping bags with imprinted messages which recipients would tend to retain more than handbills (June, 1967, page 5 and October, 1967, page 12); outdoor billboards (July, 1967, page 14); sponsorship of local radio and television programs (October, 1967, page 12 and April, 1967, page 16); sponsorship of local sports teams (October, 1967, page 28); union industry exhibits (July, 1967, page 14); and a caravan of automobiles with signs inviting spectators' attention (January, 1967, page 28).

To this list should be added the various forms of communication to which this Court made reference in footnote 1 of its *Babcock* decision. Finally, there is no logical or conceptual justification for the Seventh Circuit having sanctioned the union's failure in this case to use the most obvious instrument of communication—the telephone, whose range presumably encompasses the various suburbs in which the bargaining unit's employees resided. With but little effort, the union could have discovered the telephone numbers of the unit's employees by using its list of names and addresses and, then, using this instrument, it could have imparted its message to these employees or arranged for home or organizational meetings.

Just as the court below adopted a legal test which violated the teaching of *Babcock* that available alternative means of communication must be explored by the union, so also did the lower court too lightly dismiss the employer's property rights. If these rights are to yield, it should be only if a union has no means available effectively to reach employees elsewhere. It

cannot be doubted here that the union had ample opportunity effectively to communicate with employees away from the employer's property. Consequently, the decision of the court below adopted a test inconsistent with the *Babcock* rule when it permitted the union to solicit on private property and in doing so also created a conflict between itself and the Eighth and Ninth Circuits.[2] By way of demonstrating the aptness of the latter conclusion, and, by way of contrast with the court below, it is appropriate to examine the elements of those conflicting decisions. In the Eighth Circuit's *Central Hardware*, case *supra*, the Board's Trial Examiner concluded that there were no reasonable means available for the union to reach the employer's employees other than by solicitation on the employer's parking lot. The union there possessed the names and addresses of 80% of the unit employees. Testimony indicated that home visits were unsuccessful in contacting employees. The court, however, stated

> "It is neither surprising nor unusual for an employee to be away from home at the time an unexpected visit is made without prior appointment. The fact that a considerable number of employees were not found at home on the single occasion when [the union representative] made his unscheduled visits falls far short of establishing that home calls are not a reasonable means of communication . . . Repeat visits could doubtless be minimized or avoided by making prior appointments by telephone or letter. Messages and union literature could be left at homes where the employee is absent . . . *There is no evidence that any efforts were made to reach the employees by letter, newspaper or radio advertising or by invitations to union meetings.*" (Emphasis added.)

Applying this Court's *Babcock* test, the Eighth Circuit then held that the evidence did not support the Board's finding that

2. In *Babcock*, this Court apparently did not challenge the Board's finding that it would be unsafe for union organizers to distribute literature on the public right of way. Accordingly, a conclusion here that organizers could not safely distribute literature at the public intersections does not affect the contentions advanced in this brief.

no reasonable means of communication with the employer's employees were available to the union other than by solicitation on the employer's private property.

The facts of *Central* are strikingly similar to the facts of the instant case. The results are different because the Eighth Circuit correctly applied the *Babcock* test while the Seventh Circuit did not.

Further highlighting the conflict between the Seventh and other circuits is the Ninth Circuit's decision in *NLRB* v. *Sioux City and New Orleans Barge Lines, Inc., supra.* The record there as reported by the court revealed that the employer operated boats which were dispersed over a large territory including the area between Sioux City, Iowa and New Orleans, Louisiana. Because these boats were in nearly continuous operation, the crews worked shifts lasting from 30 to 60 consecutive days, and boarded and left the boats either in mid-stream or at ports. While the union had secured a list of employees and their home addresses from the employer, those employees lived at 118 separate residences scattered across 15 states and the union was able to contact only 35 of those 118 employees, approximately 30%, prior to the holding of an election by the Board. Although the Board's order granted the union access to the boats for solicitation, the Ninth Circuit denied enforcement, holding that this order was unsupported by substantial evidence. While in the course of its opinion the court discussed the hardship to the employer, including a potential interference with production, if access were permitted, it is clear from the court's subsequent comments that its conclusion did *not* rely upon that potential hardship. Rather, the court stated:

> "In denying the Board's order for access, we do not hold that the Board in all cases lacks the power to order access where such access may cause interference with production. But before such an order would be appropriate, the union must make a very strong showing of its inability to contact the employees. *We need not explore that question in the posture of this case because here IBU (the union) was able to successfully contact many employees; it succeeded*

> *in meeting face-to-face with 35 of the 118 employees . . . the record shows that with extra effort the union could achieve personal meetings with employees without boarding the tow boats.*" (Emphasis added.)

Thus, the court in effect held that though the union achieved some degree of contact with employees, it had a duty to make even more effort before it could validly claim a right to access to the employer's property. The union's inability to demonstrate to the Ninth Circuit that it made this effort and that it could effectively communicate with employees *only* on the employer's property obviated any need for the court to adjudicate the legal relevance of any potential hardship to the employer which access to his property might have produced.

The principal difference between the *Sioux City* case and the instant case is that in the former the court, properly applying *Babcock*, compelled the union affirmatively to demonstrate that with an expenditure of time and effort in the pursuit of existing and reasonable alternative means of communication the employees would nonetheless remain inaccessible, while in the latter, the lower court compelled no such affirmative duty.

Because of this confusion among the Circuits, in this significant and recurring area of law, it is appropriate for this Court to grant review.

## II.

### It Is Appropriate to Reexamine the Babcock Test in Light of the Board's Excelsior Rule and the Policy That Favors Elections to Resolve Representative Status.

The circumstances under which private property rights can be infringed upon by organizational rights have been significantly changed by the Board's *Excelsior* rule and the more recent emphasis on elections to resolve representative status. At the time the *Babcock* test was announced, a union, upon demonstrating to an employer that it had authorization cards from

a majority of employees in a proposed bargaining unit, could achieve bargaining rights from the National Labor Relations Board if the employer had no genuine basis to doubt the union's majority, even in the absence of any employer unfair labor practices. *NLRB* v. *George Groh & Sons*, 329 F. 2d 265 (CA 10, 1964), enforcing 141 NLRB 931 (1963); *Cosmodyne Manufacturing Company*, 150 NLRB 96 (1964). The union's opportunity to obtain such bargaining orders without the need for an election put a premium upon the effectiveness of the union's campaign efforts and its access to employees. The *Babcock* test then balanced the right of a union to achieve this majority and bargaining right against the right of an employer to use its property as it desired. However, in 1966 a new factor was introduced which it is appropriate to consider whenever this balance must now be struck. In *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966), the Board ruled that an employer must furnish the union with the name and address of each unit employee not less than ten days before a scheduled election. This rule was designed to provide the union with an unqualified opportunity to communicate with all employees in the bargaining unit at an appropriate point in the election process. The validity of this rule and its raison d'etre were upheld by this Court in *NLRB* v. *Wyman-Gordon Co.*, 394 U. S. 759 (1969), when it affirmed the Board's broad discretion to insure a fair election and its right, in the manner prescribed by the Administrative Procedure Act, to make rules and regulations necessary to carry out its duties under the National Labor Relations Act.

Following *Excelsior*, this Court issued its decision in *NLRB* v. *Gissel Packing Co., Inc. et al.*, 395 U. S. 575 (1969). With this decision, it became clear that elections were the preferred method to determine a union's representative status, because, even with a majority of authorization cards, a union could not obtain a bargaining right from the Board unless the employer committed unfair labor practices sufficiently serious to make a fair election highly improbable. Consequently, today, the ob-

jective of a union's organizing campaign logically must be to obtain and to win an election. In pursuing this objective, a union generally must obtain authorization cards from only 30% of the unit's employees in order to obtain an election and access to all such employees by the list provided under the *Excelsior* rule. Of course, the number of employees who must be contacted to achieve this 30% depends upon the union's persuasiveness. But, employer property rights should not depend upon that persuasiveness. Because organizational rights are now well protected by the Board's *Excelsior* rule, property rights should not lightly give way to an organizing campaign. Rather, before a union is permitted to solicit on an employer's property, it should be required, even more strictly than before *Excelsior*, to demonstrate by probative evidence that, despite its efforts in utilizing available channels of communication to reach employees, even 30% of the employees are inaccessible.[3]

Under *Babcock*, property rights had to yield to organizational rights if no other means to reach employees were readily available. The requirement of the *Excelsior* rule now insures that a means to reach employees, before an election, other than by solicitation on the employer's property, is readily available. The validity of a union's asserted need to utilize the employer's private property to campaign must now be measured against the developments of *Excelsior* and *Gissel*. That is, the requirements of *Babcock* must thus be interpreted to take account of the access to employees already afforded and guaranteed by *Excelsior* wholly independent of other customary means of communication which also remain available.

3. If the *Excelsior* list is incomplete or inaccurate, a union may object to the results of the election. Therefore, its organizational rights are now further protected by the Board's *Excelsior* rule.

## CONCLUSION.

For the above reasons, a writ of *certiorari* should issue to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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# In the Supreme Court of the United States

OCTOBER TERM, 1973

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No. 73-66

SCHOLLE CHEMICAL CORPORATION, ET AL.

*v.*

NATIONAL LABOR RELATIONS BOARD

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

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## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-7)[1] is not yet reported. The decision and order of the Board (Pet. App. 11-17) are reported at 192 NLRB No. 101.

### JURISDICTION

The judgment of the court of appeals (Pet. App. 8-9) was entered on February 9, 1973, and on April 12, 1973, the court denied petitioners' timely petition for rehearing (Pet. App. 10). The petition for a writ of certiorari was filed on July 5, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that non-employee union organizers were entitled

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[1] "Pet. App." refers to the separate printed Appendix filed with the petition for a writ of certiorari. "A." refers to the larger one volume Appendix in the court of appeals.

to access to company property because, in the circumstances of this case, there were no other effective means of communicating with the employees.

## STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. 3.

## STATEMENT

### A. The Board's Finding of Fact

The Scholle plant is located within an industrial tract in the Chicago suburb of Northlake, Illinois, close to the intersection of North Avenue and Railroad Avenue. A diagram illustrating this tract is set forth at Pet. App. 16. Briefly, North Avenue is a major 4-lane State thoroughfare with a posted speed limit of 40 miles per hour and an average traffic load in both directions of about 38,000 vehicles per day. Railroad Avenue is a private access road from North Avenue running through the Industrial Park. It is owned by the Automatic Electric Company—the principal occupant of the industrial tract—but Scholle has an easement for its use (A. 28). Because of surrounding buildings, railroad tracks, and other properties, the Scholle plant is accessible only from Railroad Avenue, which has exits into parking lots in the front and on both sides, of the plant (Pet. App. 21-22).

Automatic Electric, the primary user of Railroad Avenue, employs about 11,000 employees. About 40 per cent of Automatic Electric's employees (about 4,400 employees) use Railroad Avenue in entering or leaving Automatic Electric's parking lots (Pet. App. 22).[2]

[2] Its remaining employees enter or exit from Wolf Road, a public road east of the Automatic Electric plant and parallel with Railroad Avenue (Pet. App. 22).

Scholle employs about 350 people, of whom about 27 per cent live in Northlake, 58 per cent live in other Chicago suburbs, and 15 per cent live in Chicago. Scholle employees on all shifts report to and leave work in the stream of Automatic Electric employees, who also use Railroad Avenue. Neither Automatic Electric nor Scholle employees have any form of identification on their cars to distinguish one from the other (Pet. App. 22-23, 26).

On October 31, 1969, at the invitation of two employees of Scholle, Tony Hall, an international representative of the Oil Chemical and Atomic Workers International, AFL-CIO (the "Union") and another Union representative, Frank Ryan, came to the Scholle plant about 3 p.m. Hall stood near the plant's main entrance in the small area directly in front of the building (see diagram, Pet. App. 16), while Ryan stood at the entrance to the North parking lot. They spoke with Scholle employees and distributed envelopes containing a handbill and authorization card. About 5 or 10 minutes later, representatives of Scholle, after some preliminary conversation, advised Hall that Railroad Avenue was a private road and that distribution of literature was prohibited on it. In response to Hall's stated doubt, one of the representatives, a part-time officer in the Northlake Police Department, showed Hall his police badge, and required Hall and Ryan to leave. After assessing the feasibility of distributing handbills from the 50-foot strip of unpaved State property at the Northwest intersection of North and Railroad Avenues, Hall and Ryan concluded that, because of the heavy traffic on Railroad Avenue and the impossibility of telling which of the cars passing contained Scholle employees, further handbilling would not be productive (Pet. App. 23-24).

On November 6, 1969, Hall met again with his two employee contacts, reported his lack of success, and

asked them about arranging a meeting with other employees and about obtaining a mailing list. One of the employees suggested that Hall come to the plant early on Veteran's Day, when Company officials might not be around. Hall agreed, and from 6:30 to 7:30 a.m. on Veteran's Day he stood near the plant entrance and handed out about 120 handbills. Two days later Hall again met his employee contacts, who brought him an old Christmas mailing list. The list, however, was out of date, and contained mainly supervisors' addresses (Pet. App. 24).

On November 21, Hall sent Scholle a letter requesting access to the plant entrances for distribution of leaflets. On December 2, Scholle responded, asking Hall to refrain from using the private road for distribution, and pointing out that "traffic conditions are intense on this road during the hours of change of shift." The Company also noted that, in the past, organizers and picketers had respected the private ownership of the road (Railroad Avenue) and had remained on the public property of North Avenue.[3] It offered further assistance or information if needed. On January 12, 1970, Hall again wrote Scholle, asking it to supply the Union with a list of names and addresses of all current hourly employees. No reply was ever received. (Pet. App. 24-25.)

Meanwhile, on December 5, 1969, Hall, who had obtained 12 authorization cards from the employees, sent letters to each of the card signers telling them that he had filed charges with the Board and that he would be phoning soon in order to arrange to meet them. Although he thereafter called each of the card signers, he was never able to see any of them except his two original contacts. (Pet. App. 25.)[4]

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[3] Service and charitable organizations have utilized the intersection of North and Railroad Avenues to sell articles to and solicit contributions from passing motorists (Pet. App. 26-27).

[4] Hall testified that they said they were afraid to meet with him (A. 74-75).

On January 28, 1970, Hall sent a letter to about 40 employees asking them for help in compiling a mailing list of employees, and enclosing an authorization card and a self-addressed envelope. On February 12, February 24, and March 30, Hall sent additional letters enclosing authorization cards and asking for names and addresses for his mailing list (Pet. App. 25-26).[5]

On April 12, 1970, Hall, having been informed that Automatic Electric was on strike, reasoned that, because of the reduced traffic on Railroad Avenue, he might be able to reach the Scholle employees; so once again he attempted to handbill Scholle's employees. But, although Hall stood on the public area at the intersection of North and Railroad Avenues, trying both the east and west sides of Railroad Avenue for over two hours, he was unable to get anyone to stop or accept a handbill. (A. 360; 79.) Again the next morning at the same spot, Hall tried to reach Scholle employees. However, out of the hundreds of cars passing by he was able to get only 5 handbills accepted. (Pet. App. 25.)[6]

Scholle has a rule prohibiting employee solicitation within the plant and on its property. Thus, Hall was unable to get any Scholle employees to undertake any distribution of union handbills either inside the plant or in the parking lots (Pet. App. 27).

## B. The Decisions Below

The Board found that Scholle violated Section 8(a)(1) of the Act by refusing to permit non-employee

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[5] While there was no evidence in the record demonstrating how Hall came into possession of the names and addresses of those to whom his letters were mailed, the Administrative Law Judge concluded that they probably came from the letter solicitations (Pet. App. 26).

[6] The cars are only accessible from public property when they are stopped for the traffic light, and them only the outside lane is accessible (A. 79-80).

union organizers to distribute leaflets and handbills and to solicit Scholle employees on Scholle property (Pet. App. 11-12, 38-39). In so concluding, the Board adopted the Administrative Law Judge's findings that there were no reasonable means of reaching the employees either at the entrance to the plant premises or away from their place of employment.[7] The Board ordered Scholle, *inter alia,* to cease and desist from prohibiting non-employee union organizers from distributing union literature, and from soliciting union membership, in its parking areas at points reasonably adjacent both to their entrances from Railroad Avenue and to plant entrances for employees (Pet. App. 12, 39-40.

The court of appeals sustained the Board's findings and enforced its order (Pet. App. 1-7).

## ARGUMENT

In *National Labor Relations Board* v. *Babcock & Wilcox,* 351 U.S. 105, this Court held that, when non-employee union organizers wish to enter an employer's property to solicit employees, the Board must balance the organizational rights granted to the employees in Section 7 of the Act against the employer's property rights. Contrary to petitioners' assertion (Pet., pp. 9-10), this Court did not hold that the employer's property rights must yield only "in the unique case where no other means of communication is feasible." Rather, it held that the right to exclude from property must yield where "inaccessibility of [the] employees makes ineffective the reasonable attempts by non employees to communicate with them through the usual channels." (351 U.S. at 112.)[8] This Court recently

[7] Chairman Miller and Member Kennedy would have found that Scholle violated the Act by excluding the organizers from the Railroad Avenue property owned by Automatic Electric, rather than by excluding them from its own property (Pet. App. 13-17).

[8] No such conditions were found to exist in *Babcock*. For although solicitation at the plant gates was virtually impossible, the plant

reaffirmed the *Babcock* test in *Central Hardware Co. v. National Labor Relations Board,* 407 U.S. 539, 544. It also reaffirmed the principle that, where the Board has utilized the proper test, "[t]he determination whether on the record as a whole there is substantial evidence to support agency findings is a matter entrusted primarily to the courts of appeals" (407 U.S. at 548)

The court below found that substantial evidence supported the Board's finding that "because of the inaccessibility of the Scholle employees, reasonable attempts by non-employees to communicate with them through the usual channels were ineffective" (Pet. App. 6).[9] The facts set forth above, pp. 2-5, amply support the Board's finding. Thus, after its initial rebuff, the Union went to the plant on Veteran's Day, when Company officials were away, and succeeded in passing out some handbills.[10] It also obtained an old Christmas mailing list from the two original employee contacts, which proved to be useless since it was out of date and contained mainly supervisors' addresses. Thereafter, the Union tried on two occasions to distribute handbills

was "close to small, well-settled communities where a large percentage of the employees live" (351 U.S. at 113) and the usual methods of imparting information, such as mail, personal contact by telephone, on the streets, and in the employee homes, were available and had been utilized (351 U.S. at 107, n. 1, 112). The situation here, with employees scattered throughout the Chicago area and no accurate mailing list available after serious efforts to obtain one, was radically different.

[9] The court's conclusion that the Union made reasonable efforts which were "completely ineffective and non-productive" (Pet. App. 6) is not, as petitioners suggest (Pet., p. 12), an attempt to guarantee union success, but simply an application of the *Babcock* principle.

[10] Since Company officials, including one who exhibited a police badge, earlier accused union organizers of trespassing and escorted them off the property, the Company can hardly rely on the fact that the Union spent "barely over one hour at the plant site" to support its contention that the Union's campaign was "laggardly" (Pet., p. 12).

at the intersection of North Avenue and Railroad Avenue, but found this impracticable. The Union then attempted to compile a list of its own by repeated mailings to employees with requests for assistance in obtaining names and addresses, but succeeded in compiling only a partial list with an indeterminate number of incorrect names and addresses.[11] Finally, Union Representative Hall called the scattered employees and tried to arrange meetings with them, to no avail. In short, as the court below found, "[a]lthough reasonable efforts at communication were made by the union, the Scholle employees remained inaccessible" (Pet. App. 6).

The fact that this is the first case since *Babcock* to hold that an employer, other than a self-contained facility,[12] must permit non-employee organizers access to his property for the purposes of organizational activities does not detract from the substantiality of the evidence supporting the Board's findings that such an order was necessary here. Moreover, as the court of appeals held (Pet. App. 6-7), the cases relied upon by Scholle which prohibited on-site solicitation "are inapposite for in each instance feasible and effective methods of communication were available to the union organizers".

[11] The court below, in relying on Hall's uncertainty about the accuracy of the names and addresses he eventually obtained, did not shift the burden to the employer to prove the accuracy of the list, as petitioners contend (Pet., pp. 10-11). Rather, the court drew the logical conclusion that the Union did not have any reasonable means of communicating with the employees if all its efforts produced only a partial list which, under the circumstances, was of dubious value. In any event, the record reveals that some of the Union's mailings were in fact returned because of inaccurate addresses (Pet. App. 26; A. 101-102, 493-494).

[12] As petitioners point out (Pet., p. 9), there are several cases where access has been required because of the self-contained nature of the plant and the impossibility of reaching the employees away from the plant premises. See cases cited at Pet., p. 9. See also, *The Interlake Steamship Co.*, 174 NLRB 308, where the Board set aside an election and directed a new one because

The decision below is not a departure from this Court's decisions in *Babcock* or *Central Hardware*, both of which were relied on by the court below and discussed accurately by it (see Pet. App. 5-6). The matter before the court of appeals was a factual one—whether substantial evidence supported the Board's findings that the inaccessiblity of the employees made ineffective the reasonable attempts by non-employee union-organizers to communicate with them through the usual channels for such communication. The court below correctly concluded that substantial evidence supported the Board's findings. Since that is the only issue presented, and since resolution of that issue turns on the particular facts of this case, further review by this Court is nor warranted.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1973.

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the employer's refusal to permit nonemployee organizers on its property limited the organizational campaign to such an extent that it rendered a fair election impossible.

No. 73-66

SEP 21 1973

MICHAEL RODAK, JR., CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1973

**SCHOLLE CHEMICAL CORPORATION, ET AL.,**

*Petitioners,*

vs.

**NATIONAL LABOR RELATIONS BOARD,**

*Respondent.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

## PETITIONERS' REPLY BRIEF

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

## PETITIONERS' REPLY BRIEF

The Brief of the National Labor Relations Board does not dispute the two principal points advanced in Scholle's Petition. The Board concedes, as it must, that ". . . this is the first case since *Babcock* [351 U.S. 105 (1956)] to hold that an employer, other than a self-contained facility, must permit non-employee organizers access to his property for the purposes of organizational activities . . ." (Brief In Opposition, 8.) Nowhere in its Brief does the Board dispute that the decision of the Seventh Circuit in this

case conflicts with that of the Eighth Circuit in *Central Hardware Co.* v. *NLRB,* 468 F.2d 252 (8th Cir. 1972), *on remand from* 407 U.S. 539, which squarely placed the burden of proof on the union, not the employer, to demonstrate the "inaccessibility" of company employees.

By characterizing this case as involving only the issue of "substantial evidence" supporting the Board decision (Brief in Opposition, 1-2, 7, 9), the Board seeks to avoid the clear and unmistakable thrust of the Seventh Circuit's opinion. If permitted to stand, the decision will open every plant in a typical industrial setting to union solicitation. The decision of the Seventh Circuit directly conflicts with constitutional guarantees protecting the right of private property.

The so-called requirements for establishing "inaccessibility," as defined by the Seventh Circuit, would be met in every instance where a plant is located in a typical industrial setting. The distribution of handbills from public property was held "impracticable" because of traffic and the inability to identify particular Scholle employees. This would be true in any industrial setting; even if vehicular traffic were not heavy, passers-by on a sidewalk could not be distinguished from plant employees, who may use several plant exits. The regional dispersal of employees, held by the Seventh Circuit to render billboards and TV or radio appeals fruitless, is likewise characteristic of most industrial situations. While the Board relies upon the existence of only a "partial list" of Scholle employees in possession of the Union (Brief In Opposition, 8), this list in fact contained the names and addresses of over 60% of the Scholle work force and, with minimum effort, could have been completed. But the Union preferred to file a charge with the Board rather than complete the list.

*The result of the Seventh Circuit's decision is that the premises of virtually every industrial plant in the United States will be open to union solicitation campaigns, even though the union has made only a minimal effort to contact the employees by means other than use of the company's private property.*

Contrary to the Board's position (Brief In Opposition, 6), *Babcock* cannot be read as a mere neutral balancing of the union's right to organize, as opposed to the employer's right to control the use of its property. The principal interest to be protected is the employer's private property right. This Court held in *Babcock* that this constitutional right can be abrogated only in the unique case where solicitation on private property is required and reasonable alternatives are not available.

Any doubt about the primary importance to be afforded to the constitutional right to protect one's private property was laid to rest in *Central Hardware Co.* v. *NLRB*, 407 U.S. 539 (1972), where this Court, relying on *Babcock*, upheld the right of a property owner to exclude nonemployee union organizers from a shopping center parking lot. This was held to be consistent with "long-settled rights of private property protected by the Fifth and Fourteenth Amendments." 407 U.S. at 547.

The decision of the Seventh Circuit cannot be permitted to stand. Failing review by this Court, *Babcock* and *Central Hardware* will have been effectively reversed and unlimited union solicitation on private property will be permitted as a matter of course in virtually every industrial plant in the country. This result will follow even though

the union has adequate means to further its organizational efforts without resort to the use of private property.

For the reasons set forth in Scholle's Petition and in this Reply, petitioners respectfully urge that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit.

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